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9 Entertainment LLC

10
11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
13

14 REGINA KIMBELL, an individual,
d/b/a VIRGIN MOON
15 ENTERTAINMENT,

16 Plaintiff,

17 v.

18 CHRIS ROCK, an individual,
CHRIS ROCK ENTERPRISES, INC.,
19 a Delaware corporation; HBO FILMS,
INC., a Delaware corporation;
20 ROADSIDE ATTRACTIONS, LLC,
a California limited liability company;;
21 LIDDELL ENTERTAINMENT, LLC,
A California limited liability company,
22 and DOES 1 through 10, inclusive,

23 Defendants.
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CASE NO. CV09-07249 DSF(Ex)

The Honorable Dale S. Fischer

**NOTICE OF MOTION AND
MOTION OF DEFENDANTS
CHRIS ROCK ENTERPRISES,
INC., HOME BOX OFFICE, INC.,
ROADSIDE ATTRACTIONS LLC,
AND LIDDELL ENTERTAINMENT
LLC FOR ATTORNEYS' FEES**

Date: December 7, 2009
Time: 1:30 p.m.
Crtrm.: 840

Action Filed: October 5, 2009
Trial Date: None

*[Declaration of Lee S. Brenner and
[Proposed] Order filed concurrently
herewith]*

1 TO PLAINTIFF AND HER ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on December 7, 2009, at 1:30 p.m., or as soon
3 thereafter as the parties may be heard, before the Honorable Dale S. Fischer, United
4 States District Judge, in Courtroom 840 located at the Roybal Federal Building, 255
5 East Temple Street, Los Angeles, CA 90012, defendants Chris Rock Enterprises,
6 Inc., Home Box Office, Inc. (erroneously sued as HBO Films, Inc.), Roadside
7 Attractions LLC and Liddell Entertainment LLC (collectively, "Defendants") will
8 and hereby do move this Court for an order granting Defendants their reasonable
9 attorneys' fees and costs in the amount of \$ 80,000, pursuant to Section 505 of the
10 Copyright Act of 1976 and Rule 54(d) of the Federal Rules of Civil Procedure.
11 Defendants' actual fees and costs were well over \$80,000 to oppose the meritless
12 "emergency" application for a temporary restraining order and motion for a
13 preliminary injunction filed by Plaintiff Regina Kimbell ("Plaintiff"). In particular,
14 Defendants' fees and costs exceeded \$ 35,000 in connection with Plaintiff's
15 application for a temporary restraining order. In addition, Defendants incurred in
16 excess of \$ 45,000 in fees and costs in connection with Plaintiff's motion for a
17 preliminary injunction.

18 Good cause exists to grant this motion: (1) Defendants are the prevailing
19 parties; (2) Defendants are entitled to an award of their reasonable attorneys' fees
20 pursuant to Section 505 of the Copyright Act; and (3) The grant of an attorneys' fees
21 award to Defendants furthers the purposes of the Copyright Act. Notably,
22 Defendants are not asking for all of their fees and costs in connection with Plaintiff's
23 objectively unreasonable copyright infringement action. Defendants request only
24 that Plaintiff be required to reimburse Defendants for at least a portion of the fees
25 and costs which she forced Defendants to incur.

26 This Motion is made upon this Notice of Motion and Motion, the
27 accompanying Memorandum of Points and Authorities, and the Declaration of Lee
28 S. Brenner, all filed concurrently herewith; the pleadings and papers on file in this

1 action; and upon such other oral argument and/or documentary matters as may be
2 presented to this Court at or before the hearing of this Motion.

3 This Motion is made following the conference of counsel pursuant to Local
4 Rule 7-3, which conference was held on October 30, 2009.

5
6 DATED: November 4, 2009 WHITE O'CONNOR FINK & BRENNER LLP

7 Lee S. Brenner
8 Edward E. Weiman
9 Tami Kameda

10 By /s/ Lee S. Brenner

11 Lee S. Brenner

12 Attorneys for Defendants Chris Rock Enterprises,
13 Inc., Home Box Office, Inc., Liddell Entertainment
14 LLC, and Roadside Attractions LLC
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 Defendants Chris Rock Enterprises, Inc., Home Box Office, Inc. (erroneously
5 sued as HBO Films, Inc.), Roadside Attractions LLC and Liddell Entertainment
6 LLC (collectively, the “Defendants”) respectfully request an award of attorneys’
7 fees pursuant to Section 505 of the Copyright Act and Rule 54(d) of the Federal
8 Rules of Civil Procedure. Under well-settled Supreme Court and Ninth Circuit law,
9 the Court has discretion to award Defendants their attorneys’ fees. By way of this
10 motion, Defendants are *not* asking for *all* of their fees and costs in connection with
11 the meritless copyright infringement action brought by Regina Kimbell (“Plaintiff”).
12 They are merely requesting that Plaintiff bear some responsibility for reimbursing
13 Defendants for at least a *portion* of the fees and costs which she forced Defendants
14 to incur – \$35,000 in connection with Plaintiff’s meritless application for a
15 temporary restraining order and \$45,000 in connection with Plaintiff’s unreasonable
16 motion for preliminary injunction.

17 As became clear once the dust settled on Plaintiff’s so-called “emergency”
18 application for injunctive relief,¹ the two works at issue – Plaintiff’s *My Nappy*
19 *Roots* and Defendants’ *Good Hair* – did not resemble each other. A simple
20 comparison of the two movies showed no substantial similarity whatsoever between
21 them within the meaning of the Copyright Act.

22 ///

23 _____
24 ¹ As Plaintiff conceded, *Good Hair* had been publicly shown as early as January
25 2009 and Plaintiff knew about *Good Hair*’s planned theatrical release since August
26 2009. Plaintiff nevertheless waited until less than three (3) days before *Good Hair*’s
27 release before seeking “emergency” injunctive relief. Cast in its most charitable
28 light, the good faith of Plaintiff’s litigation strategy is highly suspect.

1 Finding that the two works were not substantially similar even on the basis of
 2 Plaintiff's own allegations, the Court denied Plaintiff's application for a temporary
 3 restraining order and "strongly suggest[ed]" to Plaintiff that she was not entitled to a
 4 preliminary injunction. Nevertheless, Plaintiff forced Defendants to spend in excess
 5 of \$45,000 to oppose Plaintiff's motion for a preliminary injunction. Plaintiff made
 6 little to no effort to support her own motion, but did find time to issue four (4) press
 7 releases to publicize her lawsuit and allegations, and her own documentary.

8 After undertaking its own review of the two movies, the Court denied
 9 Plaintiff's request for a preliminary injunction, expressly finding that the two works
 10 were "not substantively similar in terms of their 'theme, plot, sequence of events,
 11 characters, dialogue, setting, mood and pace.'" Dkt No. 32, Order Denying
 12 Preliminary Injunction at 3. The Court also explained that the works were less
 13 similar than Plaintiff had alleged in her pleadings. Brenner Decl., Ex. A, Hearing
 14 Transcript at 5:13-17. In response, Plaintiff quickly dismissed her copyright
 15 infringement lawsuit.

16 The Copyright Act and the applicable law supports requiring Plaintiff to
 17 reimburse Defendants for their attorneys' fees. Otherwise, there would be no
 18 disincentive for Plaintiffs to file meritless "emergency" complaints and motions in
 19 copyright cases. Particularly pertinent here, the Court had cautioned Plaintiff
 20 against proceeding with her motion for a preliminary injunction, but Plaintiff
 21 continued with her motion anyway (issuing press release after press release to
 22 publicize her own work along the way).

23 For the foregoing reasons, Defendants respectfully request reasonable
 24 attorneys' fees in the amount of \$80,000.²

26 ² A breakdown of Defendants' fees and costs is attached to the Declaration of Lee S.
 27 Brenner, filed concurrently herewith. The calculation of the requested fee is set
 28 forth in the Brenner Decl. *See* Brenner Decl., Ex. F; *see also infra* Section IV.
 (footnote continued)

1 II.

2 **FACTUAL BACKGROUND**

3 **A. Plaintiff Intentionally Delays Seeking Injunctive Relief**

4 Plaintiff allegedly completed her documentary, *My Nappy Roots*, in early
5 2006. Dkt No. 20, Plaintiff's App. at 6; Compl. ¶ 18. As the Court found, and as
6 Plaintiff admitted, Defendants' motion picture *Good Hair* has been publicly shown
7 over nine (9) months ago at the January 2009 Sundance Film Festival. Dkt No. 21,
8 Order Denying Plaintiff's Application for a TRO at 1; *see also* Compl. ¶ 21; Dkt
9 No. 20, Kimbell Decl. ¶ 11.

10 Months ago, in August of 2009, Plaintiff saw a trailer for Defendants' film,
11 *Good Hair*, at which point she came to the conclusion that "[Chris] Rock was
12 [allegedly] planning the theatrical release of a film that incorporated elements of *My*
13 *Nappy Roots*." Dkt No. 20, Plaintiff's App. at 4:22-24. Indeed, the *Good Hair*
14 trailer contained numerous elements about which Plaintiff complained, including the
15 business of Black hair, celebrity interviews, relaxer, and hair transported from India,
16 among other things. *Id.*, Kimbell Decl., Ex. 4A, Trailer. Shortly thereafter, Plaintiff
17 started setting up her lawsuit. On September 1, 2009 (over three years after she
18 created her work), she filed an application to register her movie with the United
19 States Copyright Office. *Id.*, Kimbell Decl. ¶ 1. Then, Plaintiff waited.

20 Plaintiff made no effort whatsoever to contact Mr. Rock or any of the
21 Defendants during this time. Without notice or even a demand letter, Plaintiff
22 waited until the last possible minute to seek "emergency" relief. In particular,
23 Plaintiff waited to seek *ex parte* relief from the Court until the afternoon of October
24 6, 2009, less than three (3) days before *Good Hair's* scheduled theatrical release

25
26 Although Defendants are entitled to seek fees-on-fees for the preparation of this
27 attorneys' fees motion, *see Thompson v. Gomez*, 45 F.3d 1365, 1366 (9th Cir. 1995),
28 Defendants have chosen not to seek these fees from Plaintiff.

1 date. *See* Dkt No. 20, Plaintiff's App. at 4. On the afternoon of October 6, 2009,
 2 Plaintiff first gave notice of her "emergency" application for temporary restraining
 3 order, expedited discovery, and a preliminary injunction (collectively, the
 4 "Application"), to which Defendants were required to respond within twenty-four
 5 (24) hours. *Id.*

6 In her Application, Plaintiff sought to prevent the release of *Good Hair*. *See*
 7 Dkt No. 20, Plaintiff's App. Throughout her Application and Complaint, Plaintiff
 8 repeatedly stressed that being granted injunctive relief was of vital importance in
 9 bringing this action. *Id.* at 1:25-27, 15:17-19; Compl. ¶¶ 76-77.

10 **B. The Court Denies Plaintiff's Application for a TRO**

11 On October 8, 2009, the Court denied Plaintiff's request for a TRO. *See* Dkt
 12 No. 21, Order Denying TRO. As the Court explained:

13 Plaintiff admits knowing about [*Good Hair*'s] planned
 14 public release since at least August 2009. (Appl. at 4, 7.)
 15 Nevertheless, Plaintiff makes this request a mere four days
 16 before *Good Hair* is set to be released in theaters.
 Plaintiff's eleventh hour request is untimely, and in any
 event lacks merit. For both of these reasons, the request is
 DENIED.

17 Dkt No. 21, Order Denying TRO at 1. Moreover, the Court emphasized:

18 Plaintiff does not explain the context in which [the]
 19 allegedly similar elements arise in the movies, but based
 20 on the evidence submitted by the parties, it is clear the
 21 movies are not substantively similar in terms of their
 "theme, plot, sequence of events, characters, dialogue,
 setting, mood and pace."

22 Dkt No. 21, Order Denying TRO at 6. Finally, while the Court permitted Plaintiff to
 23 proceed with her motion for a preliminary injunction, the Court expressly cautioned
 24 Plaintiff that "[her] own allegations in this application *strongly suggest* she will be

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1 unable to establish that she is entitled to a preliminary injunction.” *Id.* (emphasis
2 added).³

3 **C. Plaintiff Makes Little To No Effort To Support Her Motion For A**
4 **Preliminary Injunction, But Makes An Enormous Effort To Issue Press**
5 **Releases Regarding Her Claims And Her Film**

6 Notwithstanding the Court’s strong caution about proceeding with her motion
7 for a preliminary injunction, Plaintiff moved forward, but submitted only a three (3)
8 page supplemental brief in support of her request and some evidentiary objections.
9 *See* Dkt No. 30, Plaintiff’s Supplemental Brief. Plaintiff’s brief presented no new
10 evidence that the works were somehow substantially similar. *Id.* At the same time,
11 Plaintiff forced Defendants to incur over \$45,000 in additional fees and costs in
12 connection with Plaintiff’s motion for a preliminary injunction. Brenner Decl. ¶ 12.

13 In contrast to Plaintiff’s lack of effort to support her own motion for a
14 preliminary injunction, Plaintiff *did* have time, between October 6 and October 19,
15 2009, to issue four (4) separate press releases regarding this litigation. Brenner
16 Decl. Exs. B, C, D & E, Plaintiff’s Press Releases. Plaintiff’s press releases were
17 over twice as long, in the aggregate, as her supplemental brief. *Id.* Moreover,
18 Plaintiff’s press releases compel the conclusion that Plaintiff was more interested in
19 publicity for her own documentary than providing information regarding the merits
20 of the case. *See, e.g., Id.*, Ex. D, Plaintiff’s October 12, 2009 Press Release (not
21

22 ³ Plaintiff had requested “expedited discovery” for the ostensible purpose of having
23 her expert “provide a declaration in support of [her] application.” *See* Dkt No. 20,
24 Application at 19:11-14. Thus, in connection with Plaintiff’s motion for a
25 preliminary injunction, the Court ordered that Defendants make *Good Hair*
26 available to Plaintiff’s expert. Dkt No. 21, Order Denying TRO at 6. However, no
27 expert ever appeared, and Plaintiff never submitted any declaration of an “expert.”
28 *See* Dkt No. 30, Plaintiff’s Supplemental Brief. Instead, Plaintiff submitted only a
three (3) page supplemental brief and some evidentiary objections. *Id.*

1 mentioning denial of TRO, but providing a detailed description of Plaintiff's
2 documentary).

3 **D. The Court Denies Plaintiff's Request For A Preliminary Injunction And,**
4 **In Response, Plaintiff Quickly Dismisses Her Complaint**

5 In connection with Plaintiff's motion for a preliminary injunction, the Court
6 stated:

7 [A]fter reviewing [Plaintiff's and the Defendants' films],
8 I'm even more convinced of the correctness of my
9 decision with regard to the TRO. I am not inclined to
10 grant a preliminary injunction[.]

11 ... [¶] The issue is whether [Defendants] copied
12 something that's copyrightable, and there is . . . less
13 consistency . . . between the films than there seemed to be
14 based on the chart that [Plaintiff] gave me, which wasn't
15 enough in itself. [¶] So some of those things, as I was
16 watching the film, just got crossed out because they
17 weren't similar at all once one looked at the film.

18 Brenner Decl., Ex. A, Hearing Transcript at 3:20-22, 5:13-20. As such, the Court
19 held that "[b]ased on the evidence submitted by the Parties, and also on the Court's
20 own review of the two movies, it is clear the movies are not substantively similar in
21 terms of their 'theme, plot, sequence of events, characters, dialogue, setting, mood
22 and pace.'" See Dkt No. 32, Order Denying Preliminary Injunction at 3. The Court
23 denied Plaintiff's motion for a preliminary injunction. *Id.*

24 Two (2) days later, Plaintiff dismissed her Complaint against Defendants. See
25 Dkt No. 33, Plaintiff's Notice of Dismissal, dated October 21, 2009. Plaintiff has
26 refused to pay any of Defendants' fees or costs associated with her dismissed
27 copyright infringement lawsuit. Brenner Decl. ¶ 7.

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1 III.

2 **DEFENDANTS ARE ENTITLED TO ATTORNEYS' FEES PURSUANT TO**
 3 **THE COPYRIGHT ACT**

4 A. **Governing Standards For Attorneys' Fees Under The Copyright Act**

5 The Copyright Act of 1976 provides that in any copyright infringement
 6 action, "the court may . . . award a reasonable attorney's fee to the prevailing party."
 7 17 U.S.C. § 505. "[E]xceptional circumstances' are not a prerequisite to an award
 8 of attorneys' fees; district courts may freely award fees, as long as they treat
 9 prevailing plaintiffs and prevailing defendants alike and seek to promote the
 10 Copyright Act's objectives." *Historical Research v. Cabral*, 80 F.3d 377, 378 (9th
 11 Cir. 1996); *see also Hogan Sys., Inc. v. Cybresource Int'l, Inc.*, 158 F.3d 319,
 12 325 (5th Cir. 1998) (award of attorneys' fees in copyright cases "are the rule rather
 13 than the exception and should be awarded routinely") (citation omitted).

14 The Copyright Act requires that prevailing defendants and prevailing
 15 plaintiffs be treated alike with regard to their entitlement to attorneys' fees in this
 16 regard. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994). The United States
 17 Supreme Court explained the significance of this requirement, as follows:

18 Because copyright law ultimately serves the purpose of
 19 enriching the general public through access to creative
 20 works, it is peculiarly important that the boundaries of
 21 copyright law be demarcated as clearly as possible. To
 22 that end, defendants who seek to advance a variety of
 23 meritorious copyright defenses should be encouraged to
 24 litigate them to the same extent that plaintiffs are
 encouraged to litigate meritorious claims of infringement.
 . . . Thus a successful *defense* of a copyright infringement
 action may further the policies of the Copyright Act every
 bit as much as a successful prosecution of an infringement
 claim by the holder of a copyright.

25 *Id.* at 527 (emphasis added); *see also id.* at 535 (discretion in granting attorneys'
 26 fees must be "applied to prevailing plaintiffs and defendants in an evenhanded
 27 manner").

28 ///

In keeping with the foregoing, the Ninth Circuit has identified the following factors which should be considered in deciding whether to award the prevailing party in a copyright action its attorneys' fees: (1) degree of success obtained; (2) objective reasonableness of factual and legal arguments; (3) frivolousness; (4) motivation; and (5) need to advance considerations of compensation and deterrence. *Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 890 (9th Cir. 1996).

B. Defendants Should Be Awarded Their Attorneys' Fees

1. Defendants Obtained Complete Success In This Action

Plaintiff sought, on two separate occasions, to prevent Defendants from releasing *Good Hair* on its scheduled release date. The Court denied both requests, stressing on each occasion that it was doing so because Plaintiff was unable to establish that she was likely to succeed on the merits of her copyright claim. After twice being denied the relief she sought, and reviewing the Court's Opinion finding against her on the key element of substantial similarity, Plaintiff dismissed her complaint altogether.⁴ As a result, Defendants secured complete relief in this action, both during the pendency of the action itself, and as a result of Plaintiff's dismissal.

⁴ The fact that Plaintiff's dismissal was voluntarily does not detract from the success that Defendants achieved. In *Watson v. Country of Riverside*, 300 F.3d 1029, 1094, 1096 (9th Cir. 2002), for instance, the Ninth Circuit concluded that the plaintiff, who had been *granted* a preliminary injunction, was the "prevailing party," even though defendants were later granted summary judgment in the case. *Id.* (plaintiff "obtained significant, court-ordered relief that accomplished one of the main purposes of the lawsuit"). Here, Defendants accomplished *all* of their objectives, including the denial of Plaintiff's *ex parte* application and request for preliminary injunction, the timely release of *Good Hair*, and the dismissal of the Complaint. If, under *Watson*, the granting of a preliminary injunction renders a plaintiff the prevailing party, then the denial of a preliminary injunction should make Defendants the prevailing party. Any other rule would be contrary to the United States Supreme Court's pronouncement that prevailing defendants and prevailing plaintiffs are to be treated equally. *Fogerty*, 510 U.S. at 534.

1 **2. Plaintiff's Copyright Claim Was Both Objectively Unreasonable**
 2 **And Frivolous**

3 In order to merit an award of attorneys' fees, it is enough that the moving
 4 party demonstrate that non-moving party's claim was objectively unreasonable.
 5 *Williams v. Crichton*, 891 F. Supp. 120, 121-22 (S.D.N.Y. 1994); *Adsani v. Miller*,
 6 *PMA*, No. 94 CIV. 9131 (DLC), 1996 U.S. Dist. LEXIS 13740, at *41-52 (S.D.N.Y.
 7 Sept. 19, 1996); *Arclightz and Films Pvt. Ltd. v. Video Palace, Inc.*, No. 01 Civ.
 8 10135 (SAS), 2003 U.S. Dist. LEXIS 19086, at *24 (S.D.N.Y. Oct. 24, 2003). The
 9 moving party may satisfy its burden in this regard (as to a claim which is either
 10 objectively unreasonable *or* otherwise frivolous) by demonstrating that the claim
 11 suffers from any one of the following defects:

12 (a) the claim is based upon alleged similarities of
 13 unprotectable elements, rather than similarity of
 14 protectable expression; or

15 (b) the claim is based on "highly selective, scattered
 16 details"; or

17 (c) the claim runs contrary to the evidence

18 *Adsani*, 1996 U.S. Dist. LEXIS 13740 at *47-51; *Williams*, 891 F. Supp. at 122;
 19 *Maljack*, 81 F.3d at 884, 890.

20 Plaintiff's claim suffered from each of these defects. First, Plaintiff's claim
 21 was premised on alleged similarities between unprotectable elements of her work
 22 and *Good Hair*. The Court concluded as much in response to Plaintiff's application
 23 for a TRO and her request for preliminary injunction. *See* Brenner Decl., Ex. A,
 24 Hearing Transcript at 3:20-22, 5:13-20; *see also* Dkt No. 21, Order 10/08/09 at 6;
 25 Dkt No. 32, Order 10/19/09 at 3. Plaintiff, however, made no effort to satisfy the
 26 extrinsic test for substantial similarity by citing to any protectable elements.
 27 Accordingly, in its October 19, 2009 Order, the Court emphasized that Plaintiff had
 28 failed, once again, to "explain why the allegedly similar aspects are protectable, as

///

1 required for copyright analysis.” Dkt No. 32, Order 10/19/09 at 3 (citing *Funky*
 2 *Films v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006)).

3 Second, Plaintiff attempted to base her claim on a list of random similarities
 4 between the works at issue. Again, the Court confirmed as much in its October 8,
 5 2009 Order, in which the Court held that Plaintiff failed to “explain the context in
 6 which [her] allegedly similar elements arise in the movies[.]” Dkt No. 21, Order
 7 10/08/09, at 6. In its October 19, 2009, Order denying Plaintiff’s request for
 8 preliminary injunction, the Court reiterated that Plaintiff failed to organize her
 9 similarities in the context of the two “movies’ themes, plots, sequence of events,
 10 characters, dialogue, setting, mood, and pace.” Dkt No. 32, Order 10/19/09, at 3.
 11 Notably, in her pleadings, Plaintiff made no effort whatsoever to conduct an
 12 extrinsic test analysis for substantial similarity.

13 Finally, the majority of Plaintiff’s alleged similarities were set forth without
 14 any factual support whatsoever because they were often *contrary* to the works
 15 themselves. A simple review of the works themselves revealed that they were
 16 substantially dissimilar. As the Court found, the works were not substantially
 17 similar.

18 In addition to these flaws in Plaintiff’s claim, her persistence in seeking a
 19 preliminary injunction after the Court denied Plaintiff’s Application for a TRO,
 20 without addressing the specific, fatal defects in her claim that were identified by the
 21 Court in its Order denying Plaintiff’s TRO, was objectively unreasonable. *See* §
 22 II.C., *supra*. Plaintiff’s refusal to reconsider pursuing her claim and her failure to
 23 make any effort to correct the manifest defects in her claim are simply further
 24 evidence of the objective unreasonableness and frivolousness of her action.

25 **3. Plaintiff’s Improper Motive**

26 There is no question that a party’s litigation tactics may provide evidence of
 27 an improper motive in bringing and/or pursuing litigation. *Milton H. Greene*
 28 *Archives, Inc. v. Julien’s Auction House, LLC*, No. CV 05-7686 AHM (FMOx),

1 2007 U.S. Dist. LEXIS 96378, at *14 (C.D. Cal. Dec. 20, 2007) (citing *Yankee*
 2 *Candle Co., Inc. v. Bridgewater Candle Co., LLC*, 140 F. Supp. 2d 111, 118 (D.
 3 Mass. 2001), *aff'd*, 259 F.3d 25 (1st Cir. 2001)). For example, a plaintiff may
 4 clearly be operating under an improper motive where it forces a defendant into
 5 expensive litigation, despite having “access to sophisticated counsel who could have
 6 determined that [Plaintiff’s] suit was objectively unreasonable and frivolous.”
 7 *Mattel, Inc. v. Walking Mt. Prods.*, No. CV 99-8543 RSWL (RZx), 2004 U.S. Dist.
 8 LEXIS 12469, at *7 (C.D. Cal. June 21, 2004); *see also Berry v. Hawaiian Express*
 9 *Serv.*, No. 03-00385 SOM-LEK, 2006 U.S. Dist. LEXIS 87748, at *40 (D. Haw.
 10 Dec. 4, 2006) (“Plaintiff’s pursuit of his copyright claims . . . in spite of the lack of
 11 evidence supporting them, is a strong indication that he had an improper
 12 motivation.”).

13 Here, Plaintiff’s litigation strategy is clear evidence of an improper motive.⁵
 14 As detailed above, Plaintiff’s claim was manifestly unsupportable under copyright
 15 law. Knowing this, Plaintiff nonetheless purposefully delayed seeking “emergency”
 16 injunctive relief until the last possible moment, and then coupled her litigation
 17 tactics with a series of press releases publicizing her claims and her own
 18 documentary. *See* § II.A., *supra*. In doing so, Plaintiff forced Defendants to devote
 19 an enormous amount of time and money opposing her *ex parte* application and her
 20 request for preliminary injunction, all within a few short weeks. In the process,

21
 22 ⁵ Like the other factors set forth above, it is not necessary that Defendants
 23 demonstrate improper motive for an award of attorneys’ fees. *Maljack Prods., Inc.*,
 24 81 F.3d at 890. To the contrary, courts have awarded attorneys’ fees even where it
 25 cannot be determined “with sufficient certainty whether [the plaintiff] had an
 26 improper motive for pursuing his copyright claims.” *Love v. Mail on Sunday*, No.
 27 CV 05-7798 ABC (PJWx), 2007 U.S. Dist. LEXIS 97061, at *16 (C.D. Cal. Sept. 7,
 28 2007); *see also Maljack Prods., Inc.*, 81 F.3d at 890 (finding no bad faith, but
 awarding fees where other factors support an award); *Diamond Star Bldg. Corp. v.*
Freed, 30 F.3d 503 (4th Cir. 1994) (same).

1 Plaintiff and her counsel pursued a request for preliminary injunction knowing that
2 Defendants would spend additional resources on the effort, and *knowing* that
3 Plaintiff was not going to put *any* effort into remedying the multitude of defects that
4 the Court identified with her copyright claim.

5 Instead, it appears that Plaintiff focused more on using her lawsuit and request
6 for injunctive relief to garner publicity for *her* documentary. Plaintiff and her
7 counsel devoted significantly more ink to their four separate press releases on this
8 lawsuit than they devoted to Plaintiff's three (3) page supplemental brief in support
9 of her request for a preliminary injunction. Immediately after the Court denied her
10 request for a preliminary injunction, Plaintiff issued yet *another* press release (this
11 time, claiming that she supposedly "always knew that it would be tough getting the
12 judge to grant" her request). Brenner Decl., Ex. E.

13 As set forth above, Plaintiff and her counsel's litigation strategy was designed
14 to force the Defendants into costly litigation despite an underlying claim that
15 Plaintiff knew was objectively unreasonably and frivolous. Unless the Defendants
16 are awarded their attorneys' fees, Plaintiff's strategy will have succeeded.

17 **4. Awarding The Defendants' Attorneys' Fees Will Deter The Pursuit**
18 **Of Manifestly Unreasonable Copyright Infringement Claims**

19 Courts have acknowledged that an award of attorneys' fees to prevailing
20 defendants may fulfill the "need . . . to deter [a] Plaintiff from advancing
21 unsupportable claims." *Love*, 2007 U.S. Dist. LEXIS 97061 at *16-17; *accord*
22 *Maljack*, 81 F.3d at 890. Here, as detailed above, Plaintiff's claim was manifestly
23 unsupportable. First, Plaintiff's application was untimely on its face. Second,
24 Plaintiff could have minimized the damage caused by her failed litigation strategy
25 by withdrawing her request for a preliminary injunction (especially after the Court's
26 strong caution). Instead, Plaintiff continued to waste the time and resources of both
27 the Defendants and this Court by persisting in her claims, without advancing *any*
28 new arguments, despite being given the opportunity to do so. Two days after the

1 Court denied her request for preliminary injunction, Plaintiff simply dismissed her
2 claim.

3 In the interest of deterring Plaintiff, and others like her, from advancing
4 similarly meritless “emergency” requests for injunctive relief, Plaintiff should be
5 held responsible for at least a portion of Defendants’ attorneys’ fees. Otherwise
6 there will be no disincentive for plaintiffs to file such frivolous motions.

7 **C. Awarding Attorneys’ Fees To Defendants Furthers The Purposes Of The**
8 **Copyright Act**

9 “The primary objective of copyright is . . . ‘[t]o promote the Progress of
10 Science and useful Arts.’ To this end, copyright assures authors the right to their
11 original expression, but encourages others to build freely upon the ideas and
12 information conveyed by a work.” *Fogerty*, 510 U.S. at 527 (quoting *Feist Publ’ns,*
13 *Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991)). The nonprotection of
14 ideas “is the means by which copyright advances the progress of science and art.”
15 *Feist Publ’ns, Inc.*, 499 U.S. at 350. Because copyright law enriches the general
16 public through access to creative works, these “boundaries of copyright law [must]
17 be demarcated as clearly as possible.” *Fogerty*, 510 U.S. at 527.

18 As set forth above, Defendants’ successful defense of this action furthered the
19 purposes of the Copyright Act because it maintained the boundaries of protected
20 expression. Defendants vigorously disputed Plaintiff’s claim of ownership over
21 basic ideas, generic formats, and elements, and the Court agreed. Dkt No. 32, Order
22 10/19/09 at 3. In light of these findings, awarding the Defendants their attorneys’
23 fees would be faithful to the purposes of the Copyright Act.

24 **IV.**

25 **UNDER THE LODESTAR APPROACH, THE DEFENDANTS ARE**
26 **ENTITLED TO ATTORNEYS’ FEES IN THE AMOUNT OF \$80,000**

27 In the Ninth Circuit, courts use the “lodestar approach” to calculate the
28 amount of attorneys’ fees awards under federal fee-shifting statutes. *Staton v.*

1 *Boeing Co.*, 327 F.3d 938, 965 (9th Cir. 2003). Under this approach, the lodestar is
 2 calculated by “multiplying the number of hours the prevailing party reasonably
 3 expended on the litigation by a reasonably hourly rate.” *Morales v. City of San*
 4 *Rafael*, 96 F.3d 359, 363 (9th Cir. 1996).

5 In determining the number of reasonable hours and the reasonable hourly
 6 rate, the following *Kerr* factors guide the court:

7 (1) the time and labor required, (2) the novelty and difficulty of the
 8 questions involved, (3) the skill requisite to perform the legal service
 9 properly, (4) the preclusion of other employment by the attorney due to
 10 acceptance of the case, (5) the customary fee, (6) whether the fee is
 11 fixed or contingent, (7) time limitations imposed by the client or the
 12 circumstances, (8) the amount involved and the results obtained, (9) the
 13 experience, reputation, and ability of the attorneys, (10) the
 14 “undesirability” of the case, (11) the nature and length of the
 15 professional relationship with the client, and (12) awards in similar
 16 cases.

13 *Morales*, 96 F.3d at 363-64 (citing *Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67,
 14 70 (9th Cir. 1975)); *see also McGrath v. County of Nevada*, 67 F.3d 248, 252 (9th
 15 Cir. 1995).

16 In determining the reasonable hourly rate, courts typically use the “prevailing
 17 market rate in the relevant legal community [which is] the rates of attorneys
 18 practicing in the forum district.” *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th
 19 Cir. 1992). The quality of representation is also “generally considered” in
 20 calculating the reasonable hourly rate applied to the lodestar. *Van Gerwen v.*
 21 *Guarantee Mut. Life Co.*, 214 F.3d 1041, 1046 (9th Cir. 2000).

22 Reasonable attorneys’ fees includes the work of associate attorneys and
 23 support staff, such as paralegals because their “labor contributes to the work
 24 product.” *D’Emanuele v. Montgomery Ward & Co., Inc.*, 904 F.2d 1379, 1387 (9th
 25 Cir. 1990) (citation omitted), overruled on other grounds by *Burlington v. Dague*,
 26 505 U.S. 557 (1992). Such fees also include “out-of-pocket expenses, including
 27 travel, telephone, mailing, copying and computerized legal research expenses.” *Sure*
 28 *Safe Indus., Inc. v. C & R Pier Mfg.*, 152 F.R.D. 625, 626 (S.D. Cal. 1993); *see also*

1 *Ford Motor Co. v. Kuan Tong Indus. Co., Ltd.*, 697 F. Supp. 1108, 1110 (N.D. Cal.
2 1987) (same).

3 After calculating the lodestar, if circumstances warrant the district court may
4 adjust the lodestar on the basis of *Kerr* factors that are not already subsumed within
5 it. *Morales*, 96 F.3d at 363-64; *McGrath*, 67 F.3d at 252. There is, however, “a
6 strong presumption that the lodestar figure is reasonable, and adjustments are to be
7 adopted only in exceptional cases.” *Oviatt v. Pearce*, 954 F.2d 1470, 1482 (9th Cir.
8 1992); *see also Morales*, 96 F.3d at 363 (lodestar figure is “presumptively
9 reasonable”).

10 In this case, counsel for the Defendants have reasonably expended over 310
11 hours of attorney time and over 52 hours of paralegal time successfully defending
12 against Plaintiff’s application for a TRO and motion for a preliminary injunction.
13 *See Brenner Decl.* at ¶ 12. These hours include time spent performing, among other
14 things, legal research on Plaintiff’s copyright claim, factual investigation,
15 interviewing witnesses, researching and drafting Defendants’ Opposition to
16 Plaintiff’s Application, researching and drafting Defendants’ supplemental brief in
17 opposition to Plaintiff’s request for a preliminary injunction, corresponding with
18 clients and opposing counsel, drafting declarations, gathering exhibits, and
19 preparing for the hearing on the Plaintiff’s request for preliminary injunction.⁶ *See*
20 *Brenner Decl.*, Ex. F.

21 The rate charged by Defendants’ counsel is a blended rate of \$350 per hour
22 for all attorneys, partners and associates alike, and \$105 per hour for paralegals.
23 *Brenner Decl.* ¶ 11. This hourly rate is a discounted rate, much less than the
24 prevailing market rate, and thus is a reasonable hourly rate. *See id.*; *see also Love*,

25
26 ⁶ The hours listed herein do not reflect the total time spent or fees and costs
27 incurred for the preparation of the instant motion, or for other services performed in
28 connection with this litigation. *Id.* ¶ 12.

1 2007 U.S. Dist. LEXIS at *25 (awarding copyright attorneys' fees based upon, *inter*
2 *alia*, a partner rate of \$690 per hour, a junior associate rate of \$305 per hour, and a
3 senior paralegal rate of \$245 per hour because "[t]hese rates are consistent with the
4 rates typically charged by other highly-regarded southern California law firms for
5 similar work").

6 Moreover, the quality and experience of Defendants' counsel amply
7 demonstrate that the requested rate is more than reasonable. Lee S. Brenner is a
8 named partner at White O'Connor Fink & Brenner LLP, serving as counsel for
9 individuals, television networks, production companies, corporations and
10 partnerships in business, employment, media and entertainment lawsuits. Brenner
11 Decl. ¶ 8. Mr. Brenner has extensive experience in litigating complex civil matters
12 in both state and federal court and specializes in copyright law. *Id.* Mr. Brenner has
13 authored numerous articles on intellectual property and copyright and is often
14 sought out for his expertise in copyright law. *Id.* ¶ 9. Edward E. Weiman is
15 similarly a partner at White O'Connor Fink & Brenner LLP, representing major film
16 and television production entities and other clients in copyright, idea submission,
17 general business and antitrust litigation. Mr. Weiman frequently provides in-house
18 lectures to entertainment clients on the subjects of copyright and intellectual
19 property. *Id.* ¶ 10. Thus, counsels' requested rate should be used to calculate the
20 lodestar.

21 Counsels' hourly rate multiplied by the reasonable hours incurred comes to a
22 total of \$ 113,960. Brenner Decl. ¶ 12. This is the lodestar amount for Defendants'
23 defense of this action. Indeed, by using counsel's discounted rates, the lodestar
24 already reflects a substantial reduction in attorneys' fees that should not be further
25 reduced. Thus, Defendants are entitled to an award of \$80,000, which is less than
26 the lodestar amount pursuant to Section 505 of the Copyright Act.

27 ///

28 ///

V.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court award them \$80,000 in reasonable attorneys' fees and costs pursuant to Section 505 of the Copyright Act and Rule 54 of the Federal Rules of Civil Procedure.

DATED: November 4, 2009 WHITE O'CONNOR FINK & BRENNER LLP

Lee S. Brenner
Edward E. Weiman
Tami Kameda

By /s/ Lee S. Brenner

Lee S. Brenner

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